
Rushed Timelines, Inadequate Access to Legal Representation Impede Meaningful Opportunity to Seek Asylum Under New Asylum Processing Rule

On May 31, 2022, the Department of Homeland Security (DHS) began implementing a new asylum process, pursuant to an [Interim Final Rule](#) (referred to as the “Asylum Processing Rule,” or APR), to adjudicate asylum cases of some people who request protection in the United States. Under the Biden administration’s APR, asylum seekers who are placed in the expedited removal process by DHS and who establish a credible fear of persecution may have their asylum claim [assessed](#) in an initial, full asylum interview (“Asylum Merits Interview,” or AMI) by an asylum officer from U.S. Citizenship and Immigration Services (USCIS). Cases not granted by the Asylum Office are referred to accelerated immigration court removal proceedings. The APR imposes unreasonable deadlines that hinder access to counsel and deprive asylum seekers of a fair opportunity to present their cases.

In its initial implementation phase, DHS subjected individuals detained at two detention facilities in Texas, the South Texas Processing Center and the Houston Contract Detention Facility, to the APR, and has recently expanded implementation to the Otay Mesa Detention Center as well as some non-detained individuals.¹ Certain asylum seekers who receive positive credible fear determinations and indicate an intention to reside in Boston, Chicago, Los Angeles, Miami, Newark, New York, or San Francisco may be referred for AMIs in their destination cities. Since DHS began implementing the Biden APR in late May 2022, the Asylum Office has completed at least 159 AMIs.² Asylum seekers scheduled for AMIs to date have been predominantly from Brazil, Colombia, Dominican Republic, Ecuador, Peru, and Turkey, with the largest number of AMIs conducted for Colombian asylum seekers.

Key findings

DHS [data](#) published in late September 2022 reveals that:

- **The vast majority of asylum seekers processed under the APR to date have been unable to secure legal representation for AMIs (92.5 percent unrepresented in completed cases) or the preceding credible fear process (99.1 percent unrepresented in completed cases).**
- Counsel in asylum adjudication continues to be crucial: **asylum seekers with lawyers during AMIs were more than twice as likely to receive asylum than unrepresented individuals.**
- The APR’s **unreasonable deadlines**—including a requirement that the government schedule the AMI within 21 to 45 days of a positive credible fear determination—**hinder asylum seekers from obtaining legal representation.** The data reflects that asylum seekers have been scheduled for AMIs only weeks after being released from detention, with median times ranging from 33 to 35 days after receiving a positive credible fear determination, leaving virtually no time to secure counsel.

¹ DHS is [conducting](#) some non-detained credible fear interviews for some individuals identified for processing under the APR. DHS [data](#) published in late September 2022 reflects that 69 individuals have been processed for non-detained credible fear interviews, with 67 cases pending an outcome and two having established a credible fear of persecution.

² These statistics and those that follow on AMIs include cases that were either granted or referred to immigration court and do not include cases that were administratively closed by the Asylum Office.

These statistics raise alarm and underscore [concerns](#) that the process may fuel erroneous decisions by rushing adjudications before asylum seekers have an opportunity to adequately prepare their asylum case or secure counsel and continue to result in wasted resources as cases that should have been granted are instead referred to the immigration court for adjudication. The data also raises serious concerns about the administration's continued use of the deeply flawed expedited removal process, which leads to the deportation of refugees to persecution and torture and has already resulted in high rates of negative credible fear determinations for asylum seekers identified for processing under the APR.

Recommendations

The Biden administration and Congress should take immediate steps to ensure legal representation for asylum seekers subjected to the process. In August 2022, a coalition of groups dedicated to expanding access to legal services for asylum seekers [wrote](#) to the administration with recommendations to establish regular APR-specific stakeholder engagements, promptly provide information about individuals identified for processing under the APR to legal service providers, and ensure that asylum seekers receive a list of recognized organizations and accredited representatives for the destination city where they intend to reside when they are served with a positive credible fear determination. U.S. agencies should make it a top priority to work with Congress to provide funding for legal representation during this process.

As Human Rights First and other groups have previously [recommended](#), DHS and the Department of Justice should, in issuing a final version of the Asylum Processing Rule: provide for referral of asylum seekers for full initial Asylum Office adjudication of their cases without first subjecting them to the flawed expedited removal process; provide asylum seekers with sufficient time to secure counsel and prepare their case by removing unrealistic and counterproductive deadlines for scheduling of AMIs—including the requirement to schedule the AMI within 21 to 45 days—and accelerated immigration court process for individuals processed under the APR; and remove new restrictions on the authority of the Asylum Office to reconsider negative fear determinations—including a draconian seven-day deadline—to help ensure that refugees are not wrongly deported to persecution and torture in violation of U.S. law and treaty obligations.

Asylum seekers processed under unrealistic APR timelines overwhelmingly unable to secure legal representation

Under the Asylum Processing Rule, asylum seekers have been, to date, overwhelmingly unable to obtain legal representation. **As of mid-September 2022, only 7.5 percent of asylum seekers whose cases have been completed by the Asylum Office under the new process were represented at the AMIs (12 of 159).** This strikingly low representation rate is likely the result of the Biden APR's unreasonable timelines, practical hurdles experienced by legal services providers in identifying asylum seekers subject to the APR, barriers to representation in detention, and lack of available funding for legal representation in the process. Under this process, **asylum seekers have been rapidly scheduled for AMIs, with median times ranging from just 33 to 35 days after receiving a positive credible fear determination.**

This data reinforces concerns Human Rights First and other organizations have [repeatedly raised](#) that the unduly fast and counterproductive timelines imposed by the Biden APR, which requires the Asylum Office to schedule an AMI within 21 to 45 dates of the positive credible fear determination, do not provide adequate time to find an attorney. Given that asylum seekers often receive positive credible fear decisions prior to being released from detention, many individuals likely had less than 33 to 35 days to settle into their destination community, search for legal and other resources to address urgent housing, medical, and other issues, and gather evidence and prepare their asylum cases. As noted below, exceedingly few individuals processed under the APR had attorneys during the credible fear process given the [enormous barriers](#) detained asylum seekers face in securing legal representation or even obtaining basic legal information. Legal service providers have also

reported that it has been extremely difficult to identify individuals processed under the APR while they are detained as well as after release, a problem which is exacerbated by these short timelines, impeding efforts to provide representation.

The importance of legal representation in ensuring that asylum seekers obtain the refugee protections they are entitled to has long [been documented](#) and is also evident in the newly released data. Of the few completed AMI cases where asylum seekers had an attorney, 58.3 percent (7 of 12) were granted asylum, whereas only 28.6 percent of unrepresented asylum seekers (42 of 147) were granted asylum. **Represented asylum seekers undergoing AMIs were more than twice as likely to be granted asylum than asylum seekers without lawyers during the AMI.** These low rates of legal representation during the process may be fueling erroneous decisions by the Asylum Office and exacerbating backlogs in the immigration court, as evidenced by the significant gap in asylum grant rates between represented and unrepresented asylum seekers. **Of the 159 completed AMIs, the Asylum Office granted asylum in 30.8 percent of cases and referred 69.2 percent of cases to immigration court.**³

DHS data confirms ongoing, endemic flaws of expedited removal

The Asylum Processing Rule provides that asylum seekers may be referred for AMIs only after being subjected to the fundamentally flawed expedited removal process, which has [long resulted](#) in the return of refugees to persecution and torture. The Biden APR further exacerbated the flaws of expedited removal by eviscerating the critical [safeguard](#) of Asylum Office reconsideration of erroneous negative credible fear determinations,⁴ making it nearly impossible for USCIS to correct mistaken credible fear decisions. Funneling APR cases through detention, particularly facilities under the jurisdiction of the Houston asylum office which has a history of disproportionately low positive fear determinations and persistent allegations of misconduct and due process violations, has limited the number of asylum seekers even eligible for referral to AMIs.

DHS's recently released [data](#) shows that the positive credible fear rate at the two Texas detention facilities where the APR has been implemented since late May 2022 is extremely low, with only 48.9 percent (801 of 1,637) of asylum seekers receiving positive credible fear determinations.⁵ The Houston Asylum Office, which conducts credible fear interviews for these detention facilities, has a troubling history of [erroneous](#) negative determinations, widespread [reports](#) of misconduct during credible fear interviews, and a disproportionately low positive credible fear rate. Earlier this year, organizations that represent and advocate for asylum seekers submitted a [formal complaint](#) to the DHS Office of Inspector General and the Office of Civil Rights and Civil Liberties regarding the Houston Asylum Office's mishandling of credible and reasonable fear interviews, including the denial of access to counsel, lack of legal orientation, failure to provide appropriate interpretation, and biased and deficient individualized fear determinations. USCIS [data](#) on credible fear interviews conducted between January 1, 2022 and March 31, 2022 confirms that the Houston Asylum Office had the lowest positive credible fear determination rate (59.4 percent) nationally, whereas all other asylum offices (not including Houston) had an average positive credible fear rate of 82.1 percent for that period.

During the Biden administration, there have been mounting [reports](#) of due process violations and wrongful deportations of asylum seekers through the flawed expedited removal process. **Widespread flawed credible fear determinations have**

³ The data does not indicate the number of asylum seekers who were referred to immigration court after the Asylum Office determined that they were eligible for withholding of removal or protection under the Convention Against Torture, additional forms of protection for which asylum officers may determine eligibility under the APR.

⁴ The APR imposes a draconian, largely unmeetable seven-day deadline to submit requests for reconsiderations and limits asylum seekers to a single request.

⁵ These statistics include credible fear cases that either received positive or negative fear determinations and exclude cases that were administratively closed, dismissed by the immigration judge, or are pending. Negative credible fear determinations that are reversed by the immigration court are counted as positive credible fear determinations.

resulted in deportation orders against political activists tortured by their countries’ governments, LGBTQ individuals fleeing violence, and other refugees, as Human Rights First detailed in a comprehensive August 2022 [report](#) on the use of expedited removal. Conducting fear interviews in detention exacerbates the inherent flaws of expedited removal by subjecting asylum seekers to horrendous conditions of confinement, pushing them to undergo interviews without adequate interpretation under threat of prolonged detention, and cutting them off from legal representation and information.

The 52.5 percent positive credible fear determinations for asylum seekers in the detention centers where DHS is implementing the APR is also a dramatic departure from historical credible fear rates. Congress [intended](#) for the credible fear standard to be a low screening threshold to ensure that refugees would have an opportunity to apply for asylum. In Fiscal Year (FY) 2016, [88.3](#) percent of asylum seekers who received a credible fear screening established a credible fear of persecution. Positive credible fear determinations during the Obama and George W. Bush administrations averaged nearly [80](#) percent. Positive credible fear rates plummeted under the Trump administration due to a slew of illegal [policies](#), [regulations](#), and Attorney General [rulings](#) that rigged the system against refugees seeking asylum, falling to 44.3 percent in FY 2020. Under the Biden administration, positive credible fear rates rose to [71.4](#) percent in FY 2021, but have since declined to [62.4](#) percent in FY 2022 through mid-September.

Approximately 99.1 percent (1,624 of 1,639) of asylum seekers included in the data—almost all of whom underwent expedited removal proceedings in the two detention facilities where the APR was first implemented in late May 2022—did not have legal representation at their credible fear interviews, according to DHS [data](#).⁶ These abysmal representation rates confirm [longstanding concerns](#) that asylum seekers subjected to expedited removal face insurmountable barriers to secure legal representation. The pace and unpredictability with which credible fear interviews occur make it even more difficult to find an attorney willing to provide representation. The 0.9 percent representation rate for detained credible fear interviews is drastically lower than the already dismal representation rate for detained immigrants with pending immigration court proceedings ([30.8 percent](#)) and far below that of immigrants with pending cases who have been released from detention ([65.4 percent](#)).

Representation Rates for Asylum Seekers in Completed Credible Fear Interviews and Immigration Judge Reviews Under the Asylum Processing Rule⁷

Month of placement into expedited removal	Percentage of asylum seekers represented (total)
June 2022	0.9% (586)
July 2022	1.1% (545)
August 2022	0.8% (497)
September 2022 (as of 9/16)	0.0% (11)

Source: Department of Homeland Security, [Asylum Processing Rule Cohort Reports](#) (9/30/2022)

⁶ These statistics include credible fear cases that either received positive or negative fear determinations and exclude cases that were administratively closed, dismissed by the immigration judge, or are pending.

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